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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

JAN - 2 2003

In the Matter of:

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Amendment of Section 73.622(b)
Table of Allotments,
Digital Television Broadcast Stations.
(Tyler, Texas)

MM Docket No.01-244
RM-10234

In the Matter of:

Amendment of Section 73.622(b)
Table of Allotments,
Digital Television Broadcast Stations.
(Lufkin, Texas)

MM Docket No. 01-245
RM-10235

To: The Chief, Video Division
Media Bureau

OPPOSITION OF CIVCO, INC. TO PETITION FOR RECONSIDERATION

CivCo, Inc. ("CivCo"), permittee of stations KLTV-DT (Tyler, Texas) and KTRE-DT (Lufkin, Texas), by its attorneys and pursuant to Section 1.429(e) of the Commission's Rules,¹ hereby submits its opposition to the Petition for Reconsideration ("Petition") filed by International Broadcasting Network ("IBN"), a low power television licensee, with regard to the above-captioned **Report and Order** released on October 9, 2002. By the **Report and Order**, the Commission directed the substitution of assigned DTV allotments for KLTV-DT and KTRE-DT, as requested by CivCo.² Although the issuance of the **Report and Order** does not itself affect

¹ 47 C.F.R. § 1.429(e) (2001). As set forth in the Public Notice of the Petition, this Opposition is timely filed. *See* 67 FR 243 (Dec. 18, 2002.)

² Amendment of Section 73.622(b), Table of Allotments, Digital Television Broadcast Stations (Tyler, Texas) and (Lufkin, Texas), **Report and Order**, MM Docket Nos. 01-244 and 01-245, RM-10234 and 10235 (rel. October 9, 2002). In the **Report and Order**, the Commission adopted

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IBN's LPTV operations, construction and operation of modified facilities for KTRE-DT and KTLV-DT on the substituted channels will result in the displacement of IBN low power stations KIBN-LP (Lufkin, Texas) and KLGW-LP (Longview, Texas) (collectively, the "~~IBN~~LPTV Stations").

Throughout this proceeding, IBN stubbornly has refused to accept, address or acknowledge the Commission's well-established and consistently applied rules that lower power television stations are secondary services on the television band and must give way to full power stations, which are the primary services on the band. Practical relief is available to ~~IBN~~ by moving to other channels. CivCo, although not required to do so, has identified other suitable channels for the IBN LPTV Stations, but ~~IBN~~ has refused thus far to apply for displacement relief. Congress made only one limited exception to this longstanding policy when it established the Class **A** low power television service. IBN's low power stations, however, are not eligible for Class **A** status, therefore, have no legal basis for protection against changes to the operations of full-power broadcast stations. The Commission's rules and policies compel the decision in its *Report and Order*. IBN's Petition raises no genuine issues and must be dismissed.

Civic's request for the substitution of DTV channel 10 for station KLTW(TV)'s assigned DTV channel 38 at Tyler, Texas and of DTV channel 11 for station KTRE (TV)'s assigned DTV channel **43** at Lufkin, Texas.

I. IBN REFUSES TO ACKNOWLEDGE OR ADDRESS WELL-ESTABLISHED COMMISSION PRECEDENT THAT LOW POWER STATIONS MUST YIELD TO THE OPERATIONS OF FULL POWER STATIONS.

A. IBN Argues that a Full Power Primary Station Must Protect a Secondary Low Power Station from Interference – a Result that Stands the Commission’s Rules on Their Head.

The Commission consistently has made clear that low power television stations are secondary to full power stations.³ Non-Class A, low power stations like the IBN LPTV Stations will not be protected against the channel changes of full-power DTV stations. In its Petition, IBN raises the same issues that the Commission addressed in the *Establishment of a Class A Television Service*.⁴ The Commission reaffirmed there, as well as in its very recent order denying IBN’s request for stay in this proceeding⁵ – and every other relevant case in between – that low power television service is a “secondary spectrum priority” service and must not cause interference to full-service stations. Furthermore, with respect to the implementation of DTV, the Commission stated that “low power stations must give way to new operations by primary

³ See, e.g., 47 C.F.R. § 74.702(b); Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, MM Docket No. 87-268, *Sixth Report and Order*, 12 FCC Rcd 14588, 1141 (1997); Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, MM Docket No. 87-268, *Memorandum Opinion and Order on Reconsideration of the Sixth Report and Order*, 13 FCC Rcd 7418, ¶ 106 (1998); Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, MM Docket No. 87-268, *Second Memorandum Opinion and Order on Reconsideration of the Fifth and Sixth Report and Orders*, 14 FCC Rcd 1348, 188 (1998); Amendment of Section 73.622(b), Table of Allotments, Digital Television Broadcast Stations. (Salem, Oregon), *Report and Order*, 17 FCC Rcd 2084 (rel. Feb. 6, 2002); Amendment of Section 73.622(b), Table of Allotments Digital Television Broadcast Stations (Kingston, New York), *Memorandum Opinion and Order*, MM Docket No. 00-121, DA 02-1776 (rel. July 29, 2002);

⁴ See *Establishment of a Class A Service, Report and Order*, 15 FCC Rcd 6355 (2000).

⁵ Amendment of Section 73.622(b), Table of Allotments, Digital Television Broadcast Stations (Tyler, Texas) and (Lufkin, Texas), *Order Denying Petition for Stay*, MM Docket Nos. 01-244 and 01-245, RM-10234 and 10235, (rel. Dec. 20, 2002).

users of the spectrum, including new full service DTV stations operated by existing broadcasters.”⁶

Despite overtures of cooperation by CivCo, IBN consistently has ignored this clear policy and has opposed the displacement of KIBN-LP and KLGW-LP – a position all the more unreasonable given that IBN can preserve the programming of both stations. CivCo provided suitable displacement applications to IBN at its own expense after commissioning an engineering study to identify alternate channels. Yet IBN – in spite of CivCo’s urging – apparently has not taken any steps to preserve the programming that it claims the community values. IBN’s failure to understand the Commission’s clear rules escapes understanding, but it certainly cannot serve as a basis for a petition for reconsideration. IBN’s Petition effectively is a petition for reconsideration of the Commission’s LPTV rules, but the time for submitting such a petition has long since passed. Accordingly, the Petition must be denied.

B. IBN’s Allegations of Improper Commission Conduct Are Entirely Unsupported.

IBN implies in its Petition that the Commission was somehow improperly persuaded to grant the DTV channel changes and that certain members of the FCC’s staff should have been recused.⁷ IBN also asserts that the Commission’s *Report and Order* in this proceeding was biased and contained “unsupported and misleading statements” with respect to CivCo. IBN extends its baseless allegations to include CivCo by accusing it of making “false claims.”⁸ IBN

⁶ See Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, *Memorandum Opinion and Order on Reconsideration of the Sixth Report and Order*, 13 FCC Rcd. 7418 (1998).

⁷ Petition at 2.

⁸ *Id.* at 4.

⁹ *Id.* at 3.

provides no evidence whatsoever, of course, to support these outlandish speculations of improper conduct and incorrect outcome. The Commission's own rules and policies compelled the decision in this proceeding, and the decision itself thus stands as the strongest evidence that the agency did not exercise any bias nor act improperly. The legal principles applied in the *Report and Order* are so well-established as to leave no room for "bias" to have any part. IBN neither provides evidence to support its offensive accusations nor, with respect to CivCo, even enumerates what "claims" it thinks were "false." It is irresponsible and arguably sanctionable for a broadcaster who holds licenses in the public interest to raise such potentially scandalous accusations without meaningful support.¹⁰

C. The Commission Must Treat Similarly Situated Parties Similarly, and Thus Could Not Deny the Requested Channel Substitutions to Protect a Secondary Low Power Television Service.

IBN argues in its Petition that there is no reason for CivCo to request reallocation and that it should be required to proceed with construction on its permits under its initial allocations and that there is no provision requiring the grant of channel substitutions.' In making these arguments, IBN disregards a basic tenet of broadcast law: namely, that similarly situated parties must be treated similarly.¹² The Commission has granted numerous DTV channel changes, and low power television services are sometimes displaced by these reallocations and must give way as secondary services.¹³ IBN cites no instance of a DTV channel change being denied on the ground that a low power television station might be displaced, nor can it. IBN refuses to

¹⁰ See 47 C.F.R. § 1.52.

¹¹ Petition at 4-5.

¹² *Melody Music v. FCC*, 345 F.2d 730 (D.C. Cir. 1965).

¹³ See Amendment of Section 73.622(b), Table of Allotments, Digital Television Broadcast Stations (Fort Myers, Florida), *Report and Order*, MM Docket No. 00-180, RM-9956, ¶ 1 (rel. Nov. 20, 2002), citing *Establishment of a Class A Service*, 15 FCC Rcd 6355, 6370-71 (2000).

acknowledge the obligations of secondary stations to prevent interference to full power stations, despite having applied for and accepted licenses to operate low power stations. IBN's cognitive failure is no grounds for reversing the Commission's *Report and Order*.

11. IBN'S RELIANCE ON CONSTITUTIONAL ARGUMENTS IS MISPLACED.

IBN raises two constitutional points in an attempt to thwart the granted DTV channel changes, but these desperate attempts cannot be supported. IBN's argument that the displacement of its low power stations amounts to a taking prohibited by the Fifth Amendment is without merit.¹⁴ Section 301 of the Communications Act provides that no license granted pursuant to the act "shall be construed to create any right beyond the terms, conditions, and periods of the license."¹⁵ The courts have long held that licensees have no property interest in their licenses beyond the terms of the licenses themselves.¹⁶ Under the Commission's standard licensing forms, IBN would have been required to affirm its understanding of those principles under penalty of perjury when it first sought Commission authority to construct its low power television stations. IBN's licenses are for low power, non-Class A stations, and it has no rights in the spectrum beyond the terms of its license and the Commission rules governing its service.

IBN's claim that the Commission's classification of television stations violates the Equal Protection clause is likewise misguided." An administrative "classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal

¹⁴ Petition at 5.

¹⁵ 47 U.S.C. § 301.

¹⁶ See, e.g., *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 475 (1940); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1460 (D.C. Cir. 1985); *National Association of Broadcasters v. FCC*, 740 F.2d 1190, 1198 (D.C. Cir. 1984).

¹⁷ Petition at 5.

protection challenge if there is any reasonable conceivable state of facts that could provide a rational basis for the classification.”¹⁸ Primary full-power television stations serve broad areas of the country; low power television stations serve smaller population enclaves. The low power television service originated as a limited, secondary service that would operate only on a non-interference basis to full-service stations and that would give way to full-service stations. Here, the Commission has an obvious and rational basis for classifying low-power stations as secondary to full-service stations – to avoid interference **and** manage spectrum efficiently.

111. IBN RAISES A HODGEPODGE OF ITEMS THAT ARE MISLEADING, INACCURATE, AND IRRELEVANT TO THIS PROCEEDING.

~~IBN~~ supported its opposition to the granted DTV channel changes by citing some six thousand signatures to a “petition” it circulated around its community, and objects here that the Commission did not properly account for these “oppositions.”” The Commission, of course, governs DTV channel changes by rule and not plebiscites:’ so IBN’s manufactured “oppositions,” which have questionable provenance in any ~~event~~’ have no relevance whatsoever to any issue before the Commission in the *Report and Order*.

¹⁸ See *Communique Telecommunications, Inc. d/b/a Logical Application for Review of the Declaratory Ruling and Order Issued by the Common Carrier Bureau; Intercontinental Telephone Corp. Petition for Declaratory Ruling on National Exchange Carrier Association, Inc. Tariff F.C.C. No. 5 Governing Universal Service Fund and Lifeline Assistance Charges*, 14 FCC Rcd 13635, ¶ 33 (1999).

¹⁹ Petition at 3.

²⁰ See 47 C.F.R. § 74.702(b).

²¹ The signatures collected by IBN apparently do not reflect public sentiment. As indicated in CivCo’s Reply Comments, IBN misled the signatories with respect to the petition. At least one person collecting signatures in opposition to the DTV channel changes informed prospective signatories that one station was “kicking [KIBN-LP] off the air” without informing the community that the programming could be preserved.

IBN also continues to allege general wrongdoing on CivCo's part, but never with enough specificity to permit a meaningful response. Even if wrongdoing *were* present, however, it is well established that the Commission will not consider allegations of misconduct in the context of an allotment proceeding.²² IBN cites no authority to the contrary, nor does IBN provide any support for its imaginative assertion that wrongdoing related to an allotment proceeding should in fact be considered,²³ much less any suggestion of any conduct that would affect any aspect of the *Report and Order*.

IBN realleges that CivCo failed to provide notice as required by the Commission's rules and asserts this supposed failure as grounds for reversal.²⁴ IBN is wrong. CivCo served IBN as required throughout the rulemaking proceedings. IBN was not served with the petitions for rulemaking when they were initially filed with the Commission,²⁵ but IBN nonetheless was furnished with copies of relevant documents, including the petitions, well in advance of the date for the submission of any comments in these proceedings. IBN participated in that stage of the proceedings and has filed other pleadings as well. Having extensively participated in these proceedings, IBN cannot argue that it has been prejudiced in any fashion.²⁶

²² See, e.g., *Monterey, Tennessee and Monticello, Kentucky*, 7 FCC Rcd 1606 (1992); *Chateaugay, New York*, 9 FCC Rcd 3957 (1994).

²³ Petition at 6.

²⁴ *Id.* at 2.

²⁵ The Commission's rules did not expressly require service at that stage. See 47 C.F.R. § 1.401(d).

²⁶ Where compliance with Section 1.401(d) actually is required, the Commission will look to whether a party is prejudiced (Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Farmington, Grass Valley, Jackson, Linden, Placerville and Fair Oaks, California, Carson City and Sun Valley, Nevada), *First Report and Order*, 10 FCC Rcd. 9938, n.2 (M.M. Bur 1995)).

IBN also continues to raise nonsensical allegations with respect to CivCo ownership. A simple review of publicly available FCC ownership reports fully answers all of IBN's contentions. CivCo's *pro forma* reorganization, effectuated January 1, 2002, resulted in CivCo becoming a wholly-owned subsidiary of Civic License Holding Co., Inc. At the time the comments in this proceeding were due, prior to January 1, 2002, it would not have been possible for CivCo to submit comments, as IBN wishes, because it did not exist. Likewise, now that the *pro forma* reorganization has been effectuated, it is more appropriate for CivCo, the permittee of KLTV-DT and KTRE-DT, to respond to the Ordering Clauses than parent company Civic License Holding Co., Inc. IBN's "impossibility" argument regarding the submission of comments and compliance with the Ordering Clauses is purely fanciful and has no grounding in the Commission's rules.²⁷

IV. CONCLUSION.

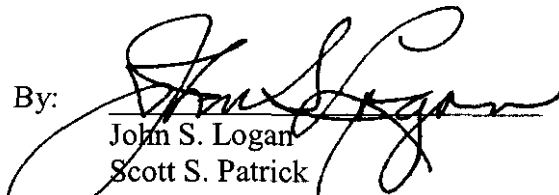
Many low power stations have been displaced by the Commission's implementation of digital television, but IBN continues to disregard the secondary status of its low power stations. IBN's efforts would be much better spent in filing and prosecuting the displacement applications that CivCo has provided to it. The Commission's decision to grant the DTV channel changes

²⁷ Petition at 6-7.

was compelled by the agency's rules and wholly consistent therewith. IBN raises no issue in its Petition that warrants reconsideration of the Commission's decision.

Respectfully submitted,

CIVCO, INC.

By: 
John S. Logan
Scott S. Patrick
Its Attorneys

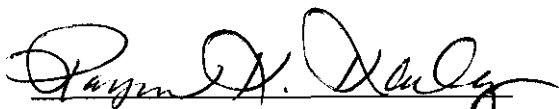
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January 2, 2003

CERTIFICATE OF SERVICE

I, Rayya Khalaf, a secretary at the law ~~firm~~ of Dow, Lohnes & Albertson, do hereby certify that on this 2nd day of January 2003, the foregoing "OPPOSITION OF CIVCO, INC. TO PETITION FOR RECONSIDERATION" was served via first class mail to the following:

Paul J. Broyles
President
International Broadcasting Network
P.O. Box 691111
Houston, TX 77269

A handwritten signature in black ink, appearing to read "Rayya Khalaf", written over a horizontal line.